B. ENVIRONMENTAL PRESERVATION ISSUES

by
Sadie Copeland and James Bloom

1. Introduction

This article will provide an update of the 1979 CPE article, Environmental and Historical Preservation Under IRC 501(c)(3). That article described the tax laws, regulations, rulings and developments as they related to both environmental and historical preservation. This article will focus on recent developments only in the environmental preservation area.

2. Background

It is generally recognized that efforts to preserve and protect the natural environment for the benefit of the public serve a charitable purpose under IRC 501(c)(3). While not explicitly mentioned in IRC 501(c)(3), this activity would fall under the "generally accepted legal sense" of charitable as described in Reg. 1.501(c)(3)-1(d)(2).

Prior to 1972, organizations with environmental concerns could be classified as "charitable" if they promoted recreational and historical purposes, furthered governmental efforts, or preserved educational benefits or enhanced scenic enjoyment. A number of revenue rulings are based on these rationales.

Several revenue rulings recognize the charitable nature of organizations designed to maintain and improve community recreational facilities. For example, Rev. Rul. 70-186, 1970-1 C.B. 128, concludes that an organization formed to preserve a lake as a public recreational facility and to improve the condition of the water in the lake to enhance its recreational features qualifies for exemption under IRC 501(c)(3).

In addition, some early revenue rulings recognize organizations as charitable where they assist governmental entities in lessening "urban blight". For example, Rev. Rul. 68-14, 1968-1 C.B. 243, holds that an organization formed to promote and assist municipal authorities in city beautification projects and to educate the public in the advantages of street planting is exempt under IRC 501(c)(3). Also, Rev. Rul. 78-85, 1978-1 C.B. 150 holds that an organization formed by residents of a city to cooperate with municipal authorities in preserving, beautifying and maintaining an urban public park is exempt under IRC 501(c)(3).)

Similarly, organizations engaged in planned land use (e.g., see Rev. Rul. 67-391, 1967-2 C.B. 190, holding that an organization formed to develop and disseminate an urban land use plan is exempt under IRC 501(c)(3)) or pollution control have also been recognized as serving a charitable purpose. For example, Rev. Rul. 70-79, 1970-1 C.B. 127, holds that an organization formed to assist local governments of a metropolitan area by conducting research to develop solutions for such problems as water and air pollution, waste disposal, water supply, and transportation is exempt under IRC 501(c)(3). The Service noted in Rev. Rul. 70-79 that the organization was assisting municipalities in the study of their pollution problems and, thus, lessening the burdens of government.

Conservation organizations which conduct educational programs have also been recognized as exempt. For example, Rev. Rul. 67-292, 1967-2 C.B. 184, holds that preserving a wild bird sanctuary and helping to maintain it facilitates public access and promotes the education of persons interested in observing wild birds.

In 1972, the Service published Rev. Rul. 72-560, 1972 C.B. 248, which utilized a slightly different rationale in recognizing as exempt an organization formed to educate the public regarding environmental deterioration due to solid waste pollution. Though part of the rationale hinged on educating the public on environmental problems and solutions, it was also considered charitable on the basis of preventing environmental deterioration. This was an early recognition of environmental preservation as a rationale separate from government assistance, education or community recreation.

3. Rev. Rul. 76-204 -- And the Evolution of Environmental Preservation As A Charitable Objective Per Se

Implicit in the revenue rulings cited above that assisted local governments to alleviate urban blight by sprucing up the landscape is the charitable nature of maintaining "green spaces" against the encroachments of urban structures. The issue of whether an organization expressly formed to preserve "green spaces" is charitable was addressed by the Service in Rev. Rul. 76-204, 1976-2 C.B. 152 and Rev. Rul. 78-384, 1978-2 C.B. 174.

In Rev. Rul. 76-204, a nonprofit organization was formed to acquire "ecologically significant" undeveloped land and either maintain the land itself with limited public access or transfer the land to a government conservation

agency by outright gift or sale (at cost plus maintenance). This landmark ruling held that preserving ecologically significant land is charitable regardless of whether members of the general public have access in order to educate themselves or enjoy the recreational resources of the area. In fact, the revenue ruling recognized that it may be necessary to limit public access to avoid damaging the delicate ecosystem.

However, a qualification to this holding was articulated in Rev. Rul. 78-384. In Rev. Rul. 78-384, the Service denied exemption to an organization formed to hold farmland and restrict its use for both preserving open space and for active farming. There was no claim that the land itself was ecologically significant. Instead, the agricultural operations were conducted in a manner that did not impair the ecology of the terrain. The ruling found that the organization, while performing some ecological protection, did not preserve land of "distinctive ecological significance". Thus, the mere preservation of existing land use patterns without a showing that the preserved tract has unique environmental traits and that the public benefit is direct and significant is not charitable.

This position was ostensibly weakened by the U.S. Tax Court in Dumaine Farms v. Commissioner, 73 T.C. 650 (1980). In that case, a trust operated a model farm as a demonstration conservation project. The farm tested experimental farming methods, and soil restoration techniques, and developed new strains of crops. It also made the results of its work available to area farmers. The court noted that the organization's goal was "to test and demonstrate the restoration of overcultivated, exhausted land to a working ecological balance" and that for "this reason it [was] essential to the [organization's] purpose that the land be generally representative of the surrounding farmland." Although the land did not have any significant environmental attributes, the Tax Court held that this was not a bar to the organization's exempt status under section 501(c)(3) as a scientific and educational organization. The court found that it was charitable because it encouraged the practice of previously untried sound farming and soil conservation techniques that the organization believed would be ecologically sound. Some have read this decision as diluting Rev. Rul 78-384's emphasis on environmentally significant property. However, the court did not really address the revenue ruling's premise, since in Dumaine Farms, exemption was narrowly based on the educational and scientific research aspects of the model farming operation. It did not reach the concept of preserving the environment as a charitable basis in its own right.

4. IRC 170(h)

Subsequent to the publication of Rev. Rul. 78-384, Congress added IRC 170(h) to the Code. The Tax Treatment Extension Act of 1980 becomes relevant in cases that concern an organization engaged in conservation purposes. That Act (Pub. L. 96-541, 1980-2 C.B. 596) substantially modified section 170 to provide a section 170 deduction for "conservation contributions." Congress made it clear that specified types of preservation activities are to be encouraged because they yield significant benefit to the public. Thus, a strong implication has been raised as to Congressional intent that organizations which are established to accept and preserve the specified types of properties and the organization and operation of which do not otherwise conflict with the requirements of IRC 501, may be entitled to exemption.

IRC 170(f)(3)(B)(iii) now provides a charitable deduction for "a qualified conservation contribution." IRC 170(h)(1) defines "qualified conservation contribution" as "a contribution of a qualified real property interest to a qualified organization exclusively for conservation purposes." Under IRC 170(h)(4)(A), a contribution that is made for any one of the following four purposes is deemed to be made for a "conservation purpose" and qualifies for a charitable deduction:

> (i) the preservation of land areas for outdoor recreation by, or the education of, the general public,
>
> (ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,
>
> (iii) the preservation of open space (including farmland and forest land) where such preservation is --
>
> (I) for the scenic enjoyment of the general public, or
>
> (II) pursuant to a clearly delineated federal, state, or local governmental conservation policy, and will yield a significant public benefit, or
>
> (iv) the preservation of an historically important area or a certified historic structure.

Reg. 1.170A-14(d)(4)(iii) sets forth guidelines to determine whether a clearly delineated government conservation policy exists for purposes of IRC

170(h)(4)(A)(iii). The regulations provide, for example, that the program must involve a significant commitment by the government with respect to the conservation project.

Reg. 1.170A-14(d)(4)(iv) sets forth factors indicative of significant public benefit for purposes of IRC 170(h)(4)(A)(iii). Generally, the preservation of an ordinary tract of land is insufficient to yield a significant public benefit, but the preservation of ordinary land areas in conjunction with other factors that demonstrate significant public benefit is sufficient. Some of the factors cited in the regulation that may demonstrate significant public benefit are: the consistency of the open space with a legislatively mandated program identifying particular parcels of land for future protection; the population density in the area of the property; and the intensity of real or potential development in the vicinity of the property.

Reg. 1.170A-14(d)(4)(vi) further explains that, although the requirements of "clearly delineated governmental policy" and "significant public benefit" must be met independently, the two requirements may also be related. The more specific the governmental policy with respect to the particular site to be protected, the more likely the governmental decision, by itself will tend to establish the significant public benefit.

The Senate report was very specific in establishing when a charitable deduction for conservation purposes would not qualify. The Senate Report (S.Rep. No. 96-1007, 96th Cong. 2d Sess. (1980), 1980-2 C.B. 603, 605) stated:

> *...The preservation of **an ordinary tract of land** would not, in and of itself, yield a significant public benefit, but the preservation of ordinary land areas in conjunction with other factors that demonstrate significant public benefit or the preservation of a unique land area for public enjoyment would yield a significant public benefit.*

Therefore, it appears that an organization whose only function is preserving ordinary farmland for farming purposes would still not qualify for IRC 501(c)(3) status. The legislative scheme of IRC 170(h) ties in rather closely with the standards set forth in Rev. Ruls. 76-204 and 78-384. Those revenue rulings held that the land must be "ecologically significant" and that preservation of ordinary farmland was not sufficient to justify charitable status. Since Congress has also indicated that preservation efforts must be directed to "unique or otherwise

significant land areas" and not to "the preservation of an ordinary tract of land," IRC 170(h) does not directly conflict with the standards set forth in Rev. Ruls. 76-204 and 78-384. Congress has determined that the preservation of farmland for farming purposes (pursuant to government designation and where it yields a significant public benefit) is worthy of a charitable deduction. Thus, IRC 170(h), as amended, indicates a Congressional intent to expand "charitability" beyond merely "ecologically significant."

After the Dumaine Farms case and the enactment of IRC 170(h), as amended, the Service addressed the "green space" issue again in G.C.M. 39055 (Nov. 7, 1983). In G.C.M. 39055, the organization was formed "to promote the preservation of prime, unique, or important" farmlands and to resell or lease these lands subject to restrictive preservation covenants. The organization reserved the right to develop supplemental or alternative land classification systems to determine whether specific land was "prime, unique and important" at its discretion.

Chief Counsel acknowledged that the standards of IRC 170(h), as amended, are broader than the charitable standards set forth in Rev. Rul. 78-384. Nonetheless, Chief Counsel concluded that an organization which has farmland preservation criteria that are not based exclusively in "a clearly delineated governmental policy" that yields "a significant public benefit" will not qualify for exemption under IRC 501(c)(3). In this case, the organization was free to disregard the state government's policy and develop "supplemental or alternative land classifications at its discretion."

Based on the discussion above, it appears that in a different factual context, an organization could be recognized as charitable under IRC 501(c)(3). For example, State A develops a farmland conservation program which encourages the preservation of tracts of ordinary farmland. Organization B employs farming techniques that are designed to conform with the state conservation policies for "green spaces" and to promote ecologically sound agriculture. Under these circumstances, the organization's activities may satisfy the requirement of being pursuant to "a clearly delineated government conservation policy" and also providing a "significant public benefit". Thus, it is arguable that the organization may qualify for exemption as an organization described in IRC 501(c)(3).

Publication is being considered in this area.

5. Indirect Environmental Action: Litigation

There are numerous federal environmental statutes, such as the Clean Water Act, that contain authorization for private lawsuits. Citizen suit provisions have been used to challenge pollution or destruction of wetlands, public water supplies, public parks and forests, wildlife and the air. There is a long list of federal cases in which the courts have recognized litigation as an appropriate and reasonable means of enforcing the law or resolving important issues.

The Service has also recognized the importance of litigation in the exempt organizations area. For many years, the Service recognized as charitable organizations which provided legal representation where such representation was not otherwise available from traditional sources. This position was expanded in G.C.M. 36539 (Dec. 29, 1975) to include as charitable organizations that maintain litigation in furtherance of their charitable purposes.

In G.C.M. 36539, the issue was raised whether an organization that institutes and maintains environmental litigation as a party plaintiff may qualify as a charitable organization under IRC 501(c)(3).

That G.C.M. held that becoming party-plaintiff in environmental litigation did not warrant IRC 501(c)(3) status. It was held that, unlike planting trees or maintaining parks, litigation did not directly benefit the environment. It was also unclear whether any individual law suit would, in fact, preserve or improve the environment. The only vehicle for charitable status for environmental preservation organizations concerned with litigation was the public interest law firms. Public interest law firms were held to be doing charity under IRC 501(c)(3) because they raised funds and supplied legal counsel for persons who were unable to afford counsel in civil cases of potential broad and beneficial public impact, such as perceived inequities in the tax system, freedom of information, Federal regulation of food, drugs, and broadcast media, and environmental policy. There were strict guidelines, prominent among which was the fact that the organization should not be the initiator or party-plaintiff to the litigation. (See CPE for 1984 at page 55 for a discussion of this type of organization.)

In G.C.M. 37661 (Aug. 30, 1978), which is reflected in Rev. Rul. 80-278, 1980-2 C.B. 175, the Service reconsidered the position and analysis taken in G.C.M. 36539. On reconsideration of this issue, Chief Counsel noted that for an organization to be recognized as exempt under IRC 501(c)(3), the purpose of the organization must be a recognized charitable purpose, but the means or activities employed to carry out those purposes do not have to be per se charitable, as long

as they are in furtherance of the exempt purpose and are reasonably related to the accomplishment of such purpose.

Therefore, the revenue ruling sets out the following analytical approach in a case such as this one: (1) Does the organization have a recognized and proper charitable purpose? (2) Are there any activities that are illegal, contrary to public policy, or violative of express statutory limitations? (3) Can the litigation be viewed as furthering the organization's exempt purpose and is it reasonably related to the accomplishment of such purpose?

The focus in this analysis is not on whether the particular litigation actually succeeds in promoting some charitable objective, but whether, if the litigation was successful, it would further the charitable objective. The G.C.M. notes that the law of charity rejects any weighing or evaluating of the objective merits of specific activities carried on in furtherance of a charitable purpose, assuming they are reasonable and not illegal or contrary to public policy.

The G.C.M. concedes that the organization's purpose to receive and expend funds in connection with protecting and restoring environmental quality was a valid and recognized charitable purpose. It concludes that the indirectness of the benefit achieved by its litigation activities was not crucial since there was ample precedent where charitable organizations could be abetting charity through the furnishing of goods or services that were not intrinsically charitable but nonetheless supported the overall charitable mission. Thus, the earlier adverse position was reversed under the specified circumstances.

Environmental protection and litigation have also been recognized as activities that promote social welfare under IRC 501(c)(4).

IRC 501(c)(4) describes organizations that are "civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare."

Reg. 501(c)(4)-1(a)(2)(ii) provides that an organization is not operated primarily for the promotion of social welfare if "its primary activity is carrying on a business with the general public in a manner similar to organizations which are operated for profit."

In G.C.M. 37963 (May 22,1979), Chief Counsel addressed the issue of whether environmental litigation was an activity that would bar recognition of

exemption under IRC 501(c)(4). Chief Counsel found that, generally, promoting the interests of consumers and protecting the environment also furthers social welfare within the meaning of IRC 501(c)(4). The G.C.M. concludes that an organization created to combat environmental deterioration and which has a clearly defined litigation program as its primary activity may qualify under IRC 501(c)(4) if it is not operating in a manner similar to a commercial law firm.

6. Self-Serving Transactions and Environmental Organizations

Although Rev. Ruls. 80-278, 76-204, and 70-186 hold that various activities protecting or restoring the environment can be charitable, the performance of these activities may not be charitable when private interests are served.

In Rev. Rul. 70-186, mentioned above as a precursor to the conservationist rulings, the organization's lake clean-up and maintenance functions conferred a benefit to lakefront property owners. In this case, the benefit was deemed to be "incidental" to the accomplishment of the broader environmental/recreational program.

However, IRC 501(c)(3) exemption was denied in Rev. Rul. 75-286, 1975-2 C.B. 210. In this revenue ruling, an organization composed of resident property owners and business operators within a certain city block was formed to preserve and beautify the public areas on the block. The restricted nature of its membership and the limited area in which its improvements were made indicate that the organization was formed to serve the private interests of its members. Therefore, it was not operated exclusively for charitable purposes. However, the organization was recognized as exempt under IRC 501(c)(4). It was found that the organization's activities promote social welfare because they beautify and preserve public property in cooperation with the local government. The Service concluded that, although its activities are limited to a particular city block, the community as a whole benefited.

Another organization that was held to be providing benefits to members that were incidental to its primary environmental restoration activity was discussed in Rev. Rul. 79-316, 1979-2 C.B. 228. In that case, the organization was formed to prevent liquid spills, primarily oil spills, within a city port area. Membership in the organization enables some members to meet part of the requirements for state licensing of their facilities. Successful operation of the organization also aids in lowering insurance rates in the port community. The revenue ruling found that by cleaning up spills of members and nonmembers and charging them equally, the

organization was preventing deterioration of the port community. Therefore, any benefits to members from aiding compliance with applicable state law and in lowering insurance rates in the port area were incidental to the primary activity of the organization.

Also relevant is G.C.M. 39561 (Sept. 30, 1986), (reflected in PLR 8600082), a foundation excise tax matter which finds that the following payment is not a qualifying distribution under IRC 4942: a payment by a foundation in settlement of a claim under a federal statute mandating clean-up of a toxic waste site created by a commercial enterprise operated by the foundation and eventually liquidated into the foundation. The payment satisfies a preexisting commercial liability that was not linked to the foundation's performance of its exempt functions.

7. G.C.M. 38415 -- Use of Disruptive Confrontation Tactics to Further Environmental Protection

G.C.M. 38415 (June 20, 1980) set out the position that an organization that employs direct confrontation tactics in pursuing its environmental protection mission could qualify as charitable nonetheless if its tactics were not in violation of the law or public policy and were in furtherance of its exempt purpose and reasonably related to the accomplishment of such purpose.

In this case, the organization provided research, films, and speakers for the education of the public with regard to environmental issues and also engaged in nonviolent confrontation activities relating to the hunting of endangered species.

The G.C.M. applies the factors set out in G.C.M. 37661, discussed above. The G.C.M. notes that an organization's charitable purpose may be negated by confrontation activity that is substantial and does not further the organization's exempt purpose or is not otherwise reasonably related to the accomplishment of such a purpose. In such a case, it is irrelevant whether the activity is illegal or contrary to public policy since it will not initially involve the carrying out of an exempt purpose. The G.C.M. concludes that the organization's confrontation tactics were neither illegal nor contrary to public policy.

8. Summary

The Service had initially considered what we now label environmental issues under the concept of open spaces and natural sanctuaries dedicated to

community recreational uses. Later, attention was directed at the educational/scientific value of wilderness acreage or features as a kind of sheltered laboratory in which to study natural phenomena.

More recently, the Service position evolved to embrace organizations dedicated to preserving natural habitats against the hazards of industrial blight as a matter of safeguarding the health of the planet and its animal and human inhabitants. This latter aspect, which includes preservation of species and maintaining the delicate ecological balance, has become the central focus of exempt organizations that deal with environmental issues.

Issues of preserving open green space within the meaning of IRC 170(h) have also contributed to an expansion of the role of conservation oriented charities.

Also, the sanctioned methodology has evolved from direct management of specific properties to initiating litigation, conducting public awareness educational campaigns, and even engaging in demonstrations and certain confrontation tactics. Some efforts to preserve or enhance the environment have also benefitted private property interests, raising the issue as to whether this aspect is minor or incidental to the broader charitable benefit.

As scientists, lawyers, and public policy professionals join hands to tackle proliferating environmental health problems, we can expect approaches and subject matter to evolve accordingly.